

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

PATRICIA T. VIA,	:	
f.k.a. Patricia T. Toomey,	:	
	:	
Plaintiff,	:	
	:	
v.	:	Civil Action No. 97-4-JJF
	:	
STAN TAYLOR, ROBERT WATSON,	:	
ALAN MACHTINGER, and RICK	:	
KEARNEY,	:	
	:	
Defendants.	:	
	:	

MEMORANDUM ORDER

During the course of the bench trial in the above-captioned action, the Court reserved judgment on several evidentiary objections raised by the parties. The parties have briefed their respective positions, and this Memorandum Order constitutes the Court's rulings with regard to the pending evidentiary matters.

A. Mr. Via's Reference To Plaintiff As His "Girlfriend"

Plaintiff objects to certain documents and testimonial evidence offered by Defendants to establish that Plaintiff must have had an improper relationship with Mr. Via while he was incarcerated, because Mr. Via told his probation and parole officer that he would be living with this "girlfriend" upon his release. In response, Defendants contend that this is proper evidence which impeaches the credibility of Plaintiff, because Plaintiff denied the existence of a relationship with Mr. Via in January 1995. Plaintiff counters that this evidence is not

relevant to impeachment, because the meaning of the term "girlfriend" as used by Mr. Via is debatable. Stated another way, Plaintiff contends that Mr. Via could have been referring to Plaintiff as a female friend, and not a romantic partner.

After reviewing the evidence at issue, the Court concludes that this evidence is not relevant to Defendants' liability, but is admissible for the narrow purpose of impeaching Plaintiff's credibility. Defendants did not acquire this evidence until after they made their decision to terminate Plaintiff, and Defendants have admitted that they terminated Plaintiff solely for her out-of-work conduct in establishing and maintaining a relationship with Mr. Via. As such, this after-acquired evidence is not relevant to liability. See McKennon v. Nashville Banner Pub. Co., 513 U.S. 352, 356-357 (1995) (recognizing in ADEA case that after-acquired evidence is not relevant to liability and stating that "the employer could not have been motivated by knowledge it did not have and it cannot now claim that the employee was fired for the nondiscriminatory reason"); Mardell v. Harleysville Life Ins. Co., 31 F.3d 1221, 1228 (3d Cir. 1994) (addressing ADEA and Title VII cases). To the extent that this evidence may be used to impeach Plaintiff's credibility by contradicting her assertion that she did not have a relationship with Mr. Via in 1995, the Court will admit the evidence. For purposes of the Court's Memorandum Opinion on the issue of

liability, the Court has weighed the impact of this evidence in assessing Plaintiff's credibility, and has concluded that it has a minimal impact on diminishing her credibility.

B. The 1979 Sandwich Incident

Plaintiff next objects to the admission of an incident which occurred in 1979 in which Plaintiff brought a sandwich into the prison. At the time of the incident, Plaintiff was newly hired by the Department, had not yet received a uniform and had not had any training. As such, Plaintiff had not been informed that a sandwich is considered contraband and might result in a security breach within the prison.

Defendants contend that this evidence is admissible under Federal Rule of Evidence 404(b). Rule 404(b) prohibits evidence of other crimes, wrongs or acts to show acts in conformity therewith, but allows such evidence to "be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident." Defendants contend that the sandwich incident shows that Plaintiff was aware that violations of prison regulations could lead to serious repercussions such as dismissal.

After reviewing this evidence, the Court concludes that it is admissible for the limited purpose of showing that Plaintiff was aware that she could be disciplined for violating prison rules. For purposes of the Court's Memorandum Opinion on

liability, however, this evidence has been given little weight. Accordingly, Plaintiff's objection will be overruled.

C. Reference To the Kansas Policy

Plaintiff objects to defense counsel's reference to a May 1, 2000 policy from the Kansas Department of Correction, which was not authenticated, not produced to Plaintiff, and not identified as an exhibit in the pretrial.¹ Defense counsel referred to this policy during his cross-examination of Plaintiff's expert witness, Mr. McManus, who was the former commissioner of the Kansas Department of Corrections. In objecting to this reference, Plaintiff further points out that the document post-dates Mr. McManus' administration in Kansas by over ten years, and Mr. McManus, who was testifying by telephone, had never seen the policy.

In response, Defendant contends that the evidence should be admitted for impeachment purposes. As an expert witness, Defendants contend that Mr. McManus' lack of knowledge regarding security policies similar to Delaware's across the country is relevant and admissible impeachment evidence.

After considering the respective positions of the parties, the Court concludes that the reference to the Kansas policy is

¹ It appears to the Court that the Kansas policy was not admitted into evidence, and thus, Plaintiff's objection is only to defense counsel's reference to the document and not to the actual admission of the document.

admissible for the limited purpose of impeaching the credibility of Mr. McManus as an expert witness. Accordingly, Plaintiff's objection will be overruled.

D. Taylor's Expert and Heresay Testimony

Plaintiff next objects to the testimony of Defendant Taylor as an expert witness. Plaintiff contends that defense counsel did not identify Defendant Taylor as an expert in the pretrial report, did not provide a report identifying subjects of expert testimony and did not produce or identify any materials from other states, institutions or learned treatises upon which he might rely as an expert. Plaintiff specifically contends that Defendant Taylor should not be permitted to sandbag Plaintiff by withholding his intent to testify about other states practices and purporting to be an expert based on his conversations with other commissioners on the subject. According to Plaintiff, Defendant Taylor's testimony violates Fed. R. Civ. P. 26(a)(2), (b)(4) and 37(c)(1). In the alternative, Plaintiff contends that Defendant Taylor's testimony about what he heard about other states' codes from other commissioners and administrators is inadmissible heresay.

In response, Defendants contend that experts are to be given "wide latitude to offer opinions, including those that are not based on first hand knowledge or observation." (D.I. 117 at 4, quoting Daubert v. Merrel Dow Pharmaceuticals, Inc., 509 U.S. 579

(1993). Further Defendants point out that pursuant to Rule 703, the facts or data relied upon by Defendant Taylor, as an expert, need not be admissible so long as it is "of a type reasonably relied upon by experts in the particular field in forming opinions." (D.I. 117, quoting Fed. R. Evid. 703).

In responding to Plaintiff's objection at trial to this testimony, the Court stated:

Obviously, Commissioner Taylor is qualified to offer expert opinions in the context of his own experience and knowledge that he has gotten. With regard to any specific issue raised by plaintiff's expert, that he would want to respond to, you can certainly offer his testimony based on his experience and knowledge, and particularly as a party in this case. He is not offered as an expert generally on institutional policy and procedure throughout the United States, because that is something you would have had to notice. He can certainly testify in contradiction to Mr. McManus as to what his view, for the purpose of the Delaware Code, is, and that it's supported by the existence of other codes throughout the country.

(Tr. B-220.)

The Court reiterates its conclusion here. Defendant Taylor may not be considered an expert on institutional policy and procedure throughout the United States, but his testimony is admissible insofar as it constitutes his expert opinion about Delaware and his understanding of practices and procedures regarding institutional security and personnel. Accordingly, the Court will admit Defendant Taylor's testimony for the limited purpose described, and overrule Plaintiff's objection.

E. The Arbitration Decision

At trial, Defendants moved into evidence the decision of an arbiter of the American Arbitration Association concluding that the Code was applicable to Plaintiff and that the state had just cause to terminate Plaintiff. Although Plaintiff admits that the arbiter's decision was the best evidence of what the arbiter held, Plaintiff objects to the introduction of this decision into evidence, because it was not identified as an exhibit in the pretrial, was not fully and fairly litigated, was not subject to appeal by either party, and was inadmissible hearsay. (Tr. B 191-193; D.I. 112, 96-97.) Plaintiff also observes that the arbiter was not a lawyer and did not address the constitutional issues at stake in this litigation.

In response, Defendants contend that Plaintiff opened the door to the introduction of the arbiter's decision, because she presented the testimony of four union officials to show that the Code was precluded from use against them in disciplinary proceedings because of their union agreement. Defendants contend that Plaintiff created confusion over this issue², and the record was sufficiently vague to allow Mr. Machtinger to testify about the arbiter's decision to clear-up the issue. Defendants further

² Defendants specifically direct the Court to the testimony of Sue Joyce. According to Defendants, Ms. Joyce gave contradictory answers as to whether Plaintiff was terminated, whether the union appealed her termination, and whether the appeal from the arbiter's decision was an unemployment matter.

contend that Plaintiff was on notice that Defendants believed the arbiter's decision was relevant, admissible evidence, because they raised the arbiter's decision with Plaintiff during the in limine proceedings. In addition, Defendants contend that the decision may be admissible under the heresay exceptions contained in Rule 803(6), records of regularly conducted activity, and Rule 803(24), the residual exception for heresay evidence which serves the interests of justice.

It is within the Court's discretion to admit or exclude exhibits not contained in the pretrial order. In this case, the Court concludes that the arbiter's decision is admissible under the heresay exceptions noted by Defendants; however, the Court has given it little weight in its decision. Accordingly, Plaintiff's objection to the admission of the arbiter's decision will be overruled.

F. Decisions of the Delaware Courts Regarding Plaintiff's Claim For Unemployment Benefits

Defendants object to Plaintiff's Exhibits 20, 21 and 22, which represent documents related to Plaintiff's claim before the Unemployment Insurance Appeal Board (the "Board"), the decision of the Delaware Superior Court reversing the Board's denial of benefits, and the decision of the Delaware Supreme Court affirming the Superior Court's decision. Defendants base their objection to these documents on their contention that issue preclusion is inappropriate in this matter. Plaintiff has not

responded to Defendant's objection.

Although the Court has concluded that collateral estoppel is not applicable in this case, the Court will overrule Defendant's objection and admit Exhibits 20, 21 and 22 into evidence.

However, as with the decision of the arbiter, the Court has given these exhibits little weight in its decision.

NOW THEREFORE, IT IS HEREBY ORDERED this 11th day of September 2002, that:

1. Plaintiff's objection to Mr. Via's reference to Plaintiff as his "girlfriend" is overruled.

2. Plaintiff's objection to the 1979 sandwich incident is overruled.

3. Plaintiff's objection to the reference to the Kansas Policy is overruled.

4. Plaintiff's objection to Taylor's expert testimony is overruled.

5. Plaintiff's objection to the arbitration decision is overruled.

6. Defendants' objection to the decisions of the Delaware Courts regarding Plaintiff's claim for unemployment benefits is overruled.

JOSEPH J. FARNAN, JR.
UNITED STATES DISTRICT JUDGE